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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BEEBE BOURNE, d/b/a BOURNE CO.,

Petitioner,

—v.—

THE WALT DISNEY COMPANY and BUENA VISTA HOME VIDEO,

Respondents,

TOWER RECORDS, INC., BARNES & NOBLE BOOKSTORES, INC., BLOCKBUSTER ENTERTAINMENT CORP., RKO WARNER VIDEO, INC. and JOHN DOES 1 THROUGH 100,

Defendants.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC. IN SUPPORT OF PETITIONER

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National Music Publishers' Association, Inc. ("NMPA") hereby moves, pursuant to Rule 37.2, for leave to file a brief *amicus curiae* in support of Beebe Bourne, d/b/a Bourne Co.'s petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. Petitioner has consented to

the filing of this brief, but respondent has declined to consent. A copy of the proposed brief is attached.[1]

As more fully explained in the "Interest of *Amicus Curiae*" section of the attached brief at 1-4, NMPA is the principal trade association of music publishers. Its members own and administer more than 60% of the musical compositions copyrighted in the United States. NMPA's wholly-owned subsidiary, The Harry Fox Agency, Inc., serves as a licensing and collection agency for more than 14,000 music publisher principals.

This case is of vital interest to NMPA and all music publishers. Issues presented in the petition lie at the very foundation of licensing efforts and practices of music publishers with respect to the use of their musical compositions. The Second Circuit's resolution of such issues is likely to have a profound effect upon the use of existing derivative works (utilizing such musical compositions) in those new uses and future uses that have been and will be spawned by the explosion of new technologies—the so-called "information superhighway" being one example.

NMPA, together with the music publishers it represents, has a critical interest in supporting the petitioner in seeking reversal of the Second Circuit's rulings which a) expand otherwise limited grants of license rights by erroneously implicating the "first sale doctrine," now codified in Section 109 of the United States Copyright Act, 17 U.S.C. § 109, and b) permit the construction of limited, specific grants of license rights to include uses via technology that did not exist at the time of such grants and was not a part of the bargain between such grantor/licensor and its grantee/licensee.

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[1] NMPA filed an *amicus curiae* brief in the Second Circuit, which granted NMPA's motion for leave to file, after NMPA received consent from Bourne and a refusal to consent from Disney.

For the foregoing reasons, NMPA respectfully requests that the Court grant leave to file the attached brief *amicus curiae* in support of Bourne's petition.

Respectfully submitted,

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May 6, 1996

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BRIEF *AMICUS CURIAE* OF NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC. IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

National Music Publishers' Association, Inc. ("NMPA"), founded in 1917, is the principal trade association representing music publishers in the United States. The over 600

music publisher members of NMPA own the copyrights in musical compositions under grants from their creators, the authors and composers, and also administer additional copyrights owned by their creators. These members, and their subsidiaries and affiliates, own or administer at least sixty percent (60%) of the musical compositions copyrighted in the United States. In addition, in 1927, NMPA established The Harry Fox Agency, Inc. ("HFA"), a wholly-owned subsidiary of NMPA, which provides licensing and collection services to over 15,000 music publisher principals.

NMPA members and publisher principals of HFA are involved in all phases of the promotion and exploitation of copyrighted songs, including discovery of new songwriters, active encouragement and adaptation of musical compositions, and promotion and negotiation of licenses with record companies, videogram manufacturers and other users. Music publishers are thus a vital force in the exploitation of the copyrights of musical compositions not only for their own benefit, but for the benefit of the songwriters whose copyrighted compositions they promote. As such, the publishers are an integral part of the creative process which the copyright laws seek to foster.

On a daily basis, NMPA and HFA publishers negotiate and enter into exclusive and non-exclusive licenses permitting many different uses of musical compositions—in phonorecords, motion pictures, videograms, print media and in the new fields of use spawned by the explosion of new technologies, such as CD-ROM and on-line computer services.

The Second Circuit decision—and the conflicts with decisions of other circuits it creates—profoundly harms the interests of music publishers, and copyright owners and creators generally, in two areas. First, the decision impacts the exploitation of copyrighted works in presently existing technology—in particular, videogram copies (e.g. videocassettes and videodiscs) derived from motion picture films embody-

ing synchronized recordings of musical compositions. Second, the rulings will affect the uses of musical compositions in newer technologies under development in today's digital age and in the future. Many future technologies are difficult if not impossible to contemplate now, let alone many decades ago, when many licenses—such as the ones from Bourne to Disney—were consummated.

The Second Circuit's holdings threaten music publishers' existing markets for videogram rights in their songs and markets to be developed for uses by way of future technological advances.[1] Contrary to rulings in other circuits, by erroneously implicating the first sale doctrine of the Copyright Act, 17 U.S.C. § 109, the Second Circuit has effectively expanded grants of limited rights to include additional rights not encompassed within such licenses. The opinion below also allows the expansion of such grants to embrace technologies not existing at the time of, or otherwise contemplated in, such licenses by permitting a 1993 jury to construe unambiguous license provisions from the 1930s.

The resultant uncertainty potentially threatens untold millions of dollars that publishers and their songwriter partners would otherwise be entitled to as their legitimate rewards for their creative efforts. The decision could also touch off a race to the courthouse, as music users head for the Second Circuit to seek declaratory judgments that their uses in new technology are permitted, and the publishers run to other circuits, like the Ninth Circuit, seeking interpretation of the Copyright Act and license grants more in keeping with previously accepted precedent and the decades-old expectations of publishers and their licensees.

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[1] The positions stated herein on behalf of music publishers also apply to all others in the copyright community, who likewise have a vital stake in the issues presented in the petition. Vigorous markets for copyrights exist for, and analogous licensing activities are engaged in by, the book publishing, motion picture, television, theater and other industries which deal in and with copyrighted works.

Since its founding, NMPA (and its predecessor organization) has been the primary industry spokesperson for the common interests of music publishers in a variety of legislative, legal, educational and public relations activities. NMPA represented its members in meetings convened by the Copyright Office and Congress in the effort to effect a comprehensive revision of the United States Copyright statute which culminated in the 1976 Act and has actively participated in subsequent proposed and implemented revisions of the Copyright Act. Most recently, NMPA played a significant role in the drafting and passage of the Digital Performance Right in Sound Recordings Act of 1995, governing the use of musical compositions in new digital media. Having a sound knowledge of and participation in the music publishing business from the early part of the century, and having repeatedly confronted and been involved in the adaptation of industry practice and copyright law to the ever-changing technological landscape, NMPA is particularly well-suited to assist the Court with the issues presented by this case.

ARGUMENT

I.

THE SECOND CIRCUIT'S DECISION CONFLICTS WITH PRECEDENT FROM OTHER CIRCUITS BY IMPROPERLY APPLYING THE FIRST *SALE* DOCTRINE TO LIMITED, *NON-EXCLUSIVE LICENSES*.

A. The First Sale Doctrine Implicates Critical Exclusive Rights Provided by the U.S. Copyright Act.

The music publishing industry relies for its lifeblood on two critical—and *separate*—rights provided by the Copyright Act: the right to *reproduce* a copyrighted work in copies or phonorecords, 17 U.S.C. § 106(1), and the right to *distribute* copies or phonorecords to the public by *sale or other trans-*

fer of ownership, or by rental, lease or lending, 17 U.S.C. § 106(3) (emphasis supplied). These rights embodied in the so-called "1976 Act" represent the modern codification of the rights to "copy" and "vend" copyrighted works provided in the Copyright Act of 1909. 17 U.S.C. § 1(a) (1947).

These rights comprise the foundation of a vigorous market and active licensing practices for the use of songs owned by music publishers. As reflected in NMPA's most recent international music publishing survey[2], the international music publishing industry posted revenues of $5.03 billion in 1993. Approximately 22% of such revenues, or $1.1 billion, were earned in the United States.[3] Of such U.S. revenues, 38% were generated under licenses which granted rights to reproduce musical works.

As new technologies have emerged over the years enabling the production of new configurations of music-bearing works (such as compact discs and videocassettes) and their use in newly developed devices (such as VCRs), the form and substance of licenses granting the rights to use songs in such music-bearing works have evolved to meet the changes. Indeed, when videogram technology first was developed in the 1970s, a process commenced in which license forms utilized in the music industry for the use of songs in synchronization with motion pictures ("synch licenses") were broadened to include provisions therein for the *making* of videogram copies and for the *distribution* of such videogram copies to the public for home use. Where earlier synch licenses did not contain express grants capable of embracing such new technologies (e.g., "for use in any form or medium, or technology hereafter to be developed and in any manner, now or hereafter devised" or words to such effect), the parties

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[2] National Music Publishers' Association, Inc., *International Survey of Music Publishing Revenues* (1995).

[3] Typically, revenues received by music publishers are shared equally between music publishers and authors under operating agreements between them.

to such licenses bargained for and entered into new licenses which permitted both the *making* and the *distribution* of videogram copies. *See, e.g., Rooney v. Columbia Pictures Industries, Inc.*, 538 F. Supp. 211 (S.D.N.Y.), *aff'd*, 714 F.2d 117 (2d Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983); *Platinum Record Co. v. Lucasfilm, Inc.*, 566 F. Supp. 226 (S.D.N.Y. 1983).

The Second Circuit's erroneous implication of the first sale doctrine provided in Section 109 greatly threatens music publishers' ability to enter new markets, such as home videotape, and take advantage of new licensing opportunities.

B. The Second Circuit's Opinion Contradicts Established Precedent Which Requires a *Transfer* of a *Particular Copy* Before the First Sale Doctrine Can Apply.

The first sale doctrine (erroneously relied on by the Second Circuit for expansion of license grants) is now set forth in Section 109 of the United States Copyright Act[4] and provides in pertinent part:

> Limitations on exclusive rights: Effect of *transfer* of *particular* copy or phonorecord
>
> a) Notwithstanding the provisions of Section 106(3), the owner of *a particular copy* or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, *to sell* or otherwise dispose of the possession of *that copy* or phonorecord.

17 U.S.C. § 109(a) (emphasis supplied).

The Second Circuit failed in its cursory attempt to distinguish its opinion in *Platt & Munk Co. v. Republic Graphics,*

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[4] Since this case involves 1930s copyrights, the applicable formulation of the first-sale doctrine is actually that appearing at 17 U.S.C. § 27 (1947), which was restated in 17 U.S.C. § 109.

Inc., 315 F.2d 847 (2d Cir. 1963), ignoring *Platt & Munk*'s repetition of the requirement that lawful ownership must be obtained by *transfer*, such as sale, of the physical object in return for a satisfactory price. The Second Circuit also opined that Bourne has received its "reward" for Disney's sale of videocassettes. The Second Circuit's summary rejection of what music publishers have regarded as a well-established interpretation (and limitation) of the doctrine is alarming to the music publishing community and brings with it previously unforeseen consequences.

Both portions of the Second Circuit's analysis are fatally flawed. First, there was no *transfer* of a physical videocassette from Bourne to Disney; section 109 specifically recognizes that the first sale doctrine requires a "*transfer* of a *particular copy*. . ." 17 U.S.C. § 109. In this case, Disney manufactured the videocassettes itself. Even assuming such manufacture had been authorized, Disney cannot avail itself of the first sale doctrine since the videocassettes came into Disney's possession by virtue of Disney's own manufacture of the videocassettes, not from a transfer by Bourne. *See* cases cited in petition at 8-9. This error is the most critical one made by the Second Circuit, which was unable to cite any authority for the proposition that the first sale doctrine's protection may be invoked by a party who actually manufactured the copy or phonorecord at issue. The doctrine's history, as borne out by the legislative history and judicial precedent, makes crystal clear that a party may only invoke the doctrine after *receiving* a lawfully made tangible copy or phonorecord from another party, *not* by first manufacturing the copy or phonorecord itself.

Moreover, Bourne cannot be said to have received its reward for use of the videocassettes, as the Second Circuit held. First, Bourne never had possession or use of the videocassettes, which possession or use is an implicit requisite in the "reward" analysis. Further, Bourne did not grant Disney the right to "exploit" the works, but merely to exhibit the

relevant motion pictures in theaters. Thus, the only reward Bourne received was in connection with film exhibition, not videocassette use.

In addition, the Second Circuit's fear of leaving Disney with a license to produce, but not sell, videotapes wholly ignores the substance of the licenses at issue. The Second Circuit's ruling that "motion pictures" could include videotapes was based on evidence that a videotape was merely another method of storing a motion picture. If so, Disney's use of such videotapes should be limited to only the uses permitted by the 1930s licenses, which indisputably did not contain the right to vend. Accepting the Court's interpretation of the license grant of "motion picture" rights, Disney would still be free to arrange for the exhibition of a videotape copy of, say, *Snow White* in a theater, but not to sell such videotapes for home use. Thus, Disney does not need a vending right in order to receive the full benefit of the licenses.

The concept of selling vast quantities of videocassettes for consumers' personal, in-home use, and the broad market therefor, came about decades after the agreements at issue. The Second Circuit is not free simply to change the licenses to conform to today's market conditions, without further compensation to Bourne. It would seem that the Second Circuit has chosen to rewrite the first sale doctrine, an activity reserved for Congress. As this Court pronounced at the beginning of the videotape explosion, "[s]ound policy, as well as history, supports our consistent deference to Congress when major technological changes alter the market for copyrighted materials." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984).

The Second Circuit's disturbing reformulation of the first sale doctrine effectively eviscerates the "vending" or distribution right, as currently embodied in 17 U.S.C. § 106(3).

Music publishers, as well as other copyright owners, have relied for years (since at least the time of this Court's ruling

in *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908)) on the well-established parameters of the first sale doctrine—in particular, the absolute, unequivocal prerequisite of a "sale" or other *transfer*. The Second Circuit's decision upsets the certainty on which music publishers have relied in their licenses of reproduction rights, particularly of motion pictures, and throws a major degree of uncertainty into copyright jurisprudence. As this Court recently taught, such uncertainty as to the interpretation of an important part of the copyright law is unacceptable:

> Because copyright ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible.

Fogerty v. Fantasy, Inc., ___ U.S. ___, ___, 114 S. Ct. 1023, 1030 (1994).

That uncertainty could well open the floodgates to litigation, touching off numerous races to the courthouse. With the Second Circuit turning its back on its prior formulation in *Platt & Munk*, copyright users, such as Disney, who are only licensed to *reproduce* works will be more likely to commence actions there for declarations that they also be permitted to *sell* videotapes and other derivative works they manufacture. Music publishers, on the other hand, will set off for circuits which have remained true to the first sale doctrine's historic contours.

The uncertainty and conflict resulting from the Second Circuit decision on this recurring issue independently warrant this Court's review of this case.

II.

THE SECOND CIRCUIT MISTAKENLY PERMITTED A JURY TO CONSTRUE UNAMBIGUOUS LICENSE GRANTS TO INCLUDE RIGHTS UNKNOWN AND UNCONTEMPLATED AT THE TIME OF SUCH GRANTS.

The Second Circuit improperly affirmed the jury's interpretation of the agreements in a manner totally contrary to law. Both the process of giving the contracts to the jury and the resultant misinterpretation would prove devastating to copyright owners if not reviewed and overturned by this Court.

A clear and unambiguous contract must be interpreted by the court (never a jury) according to the plain, ordinary and common meaning of the terms therein. *CCG Assocs. I v. Riverside Assocs.*, 157 A.D.2d 435, 440, 556 N.Y.S.2d 859, 861 (1990). A review of the plain meaning of the language of these agreements at the time they were entered into unambiguously demonstrates the utter lack of any grant of videogram rights.

The Second Circuit's reliance on a definition of "motion pictures" which appeared in 1971 proves utterly worthless to the interpretation of agreements bargained for over thirty years earlier. Focusing on the parties' intent at the time of contracting, it is beyond dispute that the term "motion pictures" in 1933 and 1939 referred only to negatives and positive film prints thereof depicting a series of images. *See Metro-Goldwyn-Mayer Distrib. Corp. v. Bijou Theatre Co.*, 3 F. Supp. 66 (D. Mass. 1933). In fact, in the 1930s, the terms "motion pictures" and "films" were essentially synonymous. *Metro-Goldwyn-Mayer Distrib. Corp. v. Bijou Theatre Co.*, 59 F.2d 70 (1st Cir. 1932) ("Prints of the *pictures or films as they are called* are not produced for sale.") (emphasis supplied). More importantly, copies of these motion pictures were rarely sold; rather, the producer would license the film to theaters

and other exhibitors for a short period of time.[5] *Id.* After that brief period, the print would be shipped to another exhibitor, who would similarly license and exhibit the film for a specified period of time. *Id.* Since the motion picture producer retained title to all copies, the producer (or its exclusive agent) exercised a great deal of control over the exhibition of each copy. This method of income producing is all that was entailed with a grant of rights to synchronize music with a motion picture in the 1930s, *id.*, and accordingly all that Disney and Bourne could have intended and bargained for.[6]

An understanding of this background is crucial to understanding the parties' intent in the context of subsequent case law. Since the 19th century, courts have confronted similar questions of the effect of license grants under copyright on uses through new technology. One relatively recent decision which has had a major, positive impact on the relationship between music publishers and movie producers is *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851, 853 (9th Cir. 1988). The *Cohen* court was called upon to interpret a grant of rights which permitted the motion picture producer to perform the musical composition at issue in connection with the exhibition of the motion picture in theaters and by means of television.

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[5] Since it was essentially their sole source of revenue, motion picture producers were vigilant in enforcing the time periods of the licenses. *See Metro-Goldwyn-Mayer Distrib. Corp. v. Bijou Theatre Co.*, 59 F.2d 70 (1st Cir. 1932) (suit for copyright infringement after exhibitor screened motion picture one day later than specified in license).

[6] The Second Circuit's reliance on the very limited home uses of Disney's short cartoons in the 1930s as paving the way for inclusion of videocassettes within the licenses is misplaced. These negligible in-home uses do not alter the main characteristics of a 1930s motion picture. More importantly, neither Disney nor the Second Circuit can dispute that the current market for sales of full-length, feature videocassettes did not exist until many decades after the agreements at issue were negotiated.

The Ninth Circuit in *Cohen* held that such a limited license could not encompass videocassette distribution—a process, underlying technology, and market which did not exist at the time of the 1969 contract. (Of course, such distribution did not exist in the 1930s, an undisputed fact the Second Circuit conveniently overlooked by its reference to limited home uses of short cartoons.) *Cohen*'s insightful analysis and comparison of television and videocassette uses is instructive as to the radical difference between 1990s videograms and 1930s motion pictures:

> Television requires an intermediary network, station or cable to send the television signals into consumers' homes. The menu of entertainment appearing on television is controlled entirely by the intermediary and, thus, the consumer's selection is limited to what is available on various channels. Moreover, equipped merely with a conventional television set, a consumer has no means of capturing any part of the television display; when the program is over it vanishes, and the consumer is powerless to replay it. Because they originate outside the home, television signals are ephemeral and beyond the viewer's grasp.
>
> Videocassettes, of course, allow viewing of a markedly different nature. Videocassette entertainment is controlled within the home, at the viewer's complete discretion. A consumer may view exactly what he or she wants (assuming availability in the marketplace) at whatever time he or she chooses. The viewer may even "fast forward" the tape so as to quickly pass over parts of the program he or she does not wish to view.

Id. at 853-54 (emphasis supplied). The Ninth Circuit then continued that "perhaps the primary reason" why the phrase "exhibition by means of television" could not encompass

videocassette distribution is that VCRs for home use were not known at the time the license was executed. Neither party could have known of the existence of videocassettes, and the original licensee could not have bargained or paid for rights associated with videocassette reproduction. *Id.* at 854.

This correct analysis is equally applicable to any unknown technology or means of distribution. As the Ninth Circuit explained, "The holder of the license should not now 'reap the entire windfall' associated with the new medium." *Id.* (citation omitted). Unfortunately, the Second Circuit's ruling would permit Disney to reap a tremendous and unprecedented windfall and encourage others to attempt to stretch limited licenses past their breaking point. In addition, such ruling would negatively impact opportunities for music publishers and others to bargain for and license newly developed uses of their copyrighted works.

Cohen's analysis has been specifically adopted by New York courts in *Tele-Pac, Inc. v. Grainger*, 168 A.D.2d 11, 570 N.Y.S.2d 521, *appeal dismissed*, 79 N.Y.2d 822, 580 N.Y.S.2d 201 (1991) and *General Mills, Inc. v. Filmtel Int'l Corp.*, 206 N.Y.L.J. 25 (Sup. Ct. Oct. 10, 1991), *aff'd*, 195 A.D.2d 251, 599 N.Y.S.2d 820 (1993), both of which extensively quoted *Cohen*'s analysis set forth above. *See Rey v. Lafferty*, 990 F.2d 1379, 1390 (1st Cir.), *cert. denied*, 114 S. Ct. 94 (1993) (television license did not include videocassette rights since license contained no general grant of rights in future technologies, following *Cohen*); *see also Kirke La Shelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 188 N.E. 163 (1933) (term "motion picture rights" could not include right to produce "talkies" when such rights were not in contemplation of the parties since only silent films existed at time of 1918 contract).

The differences between films and videocassettes are patently obvious and similar to the differences between television and videocassette distribution rights explained in

Cohen. In fact, *Cohen*'s very language is easily adapted to the instant situation:

> By their very essence, then, videocassettes liberate viewers from the constraints otherwise inherent in television [and movies], and eliminate the involvement of an intermediary, such as a network [or a movie theater].

Cohen, 845 F.2d at 854. In other words, 1990s videograms and 1930s motion pictures differ in virtually every meaningful way. Therefore, such videocassette rights could not have been bargained for in the Agreements at issue. The notion of a motion picture film being converted to a new type of electromagnetic copy made for sale to a private individual for at-home viewing on newly developed devices could only be a notion that developed long after these contracts were executed. The parties negotiated for and agreed upon uses which were in existence in 1939 *only*. *There was no all-encompassing grant embracing later-developed technology and uses* which might have justified the result below, such as the grant which Disney negotiated in 1939 with respect to the film *Fantasia*. *See Muller v. Walt Disney Prods.*, 871 F. Supp. 678, 682-84 (S.D.N.Y. 1994) (contract governed motion pictures "produced and/or exhibited with or accompanied by . . . all other improvements and devices which are now or hereafter may be used. . ."). The Second Circuit erred by permitting a 1939 contract to be remade into a 1995 contract.

The Second Circuit's decision threatens to disrupt the means of doing business between music publishers and users. Music publishers have relied on the accumulating authority, which includes *Cohen*, *Tele-Pac* and *Rey*, to vindicate that which music publishers knew as a matter of logic and business instinct, i.e. that which did not exist could not be included in a limited license when compared with the extremely broad grant of rights given by Congress to copyright owners. The growing weight of this authority had not

been judicially contradicted until the Second Circuit's decision; the remaining cases which hold otherwise almost uniformly concern contracts in which unknown uses and devices were contemplated with a very broad grant of rights. *See, e.g., Muller*, 871 F. Supp. 678; *Platinum Record Co. v. Lucasfilm, Ltd.*, 566 F. Supp. 226 (D.N.J. 1983); *Rooney v. Columbia Pictures Indus., Inc.*, 538 F. Supp. 211 (S.D.N.Y.), *aff'd*, 714 F.2d 117 (2d Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983). The absence of such a sweeping grant in which the parties specifically embrace unknown uses and devices must prevent the licenses at issue from encompassing unknown and uncontemplated technology and uses.

Overall, the Second Circuit was presented with two paths. The first, urged by NMPA and the petitioner, follows established Ninth Circuit precedent and affords further stability to the relationship between music publishers and copyright users based on sound legal reasoning. Instead, the Second Circuit chose the second path, grafting an unbargained-for videocassette right onto the limited license of rights at issue in an unprecedented manner and rendering an untold multitude of old licenses susceptible to uncontemplated, retroactive construction. The Second Circuit's choice has thrown the law on this issue into a terrible state of flux, inviting still more conflict and providing no guidance.

Music publishers and users have been perfectly capable of negotiating the sharing of the benefits of new technologies and uses to the advantage of all interested parties. It was not, nor should it be, a court's role to revise the business practices of an industry either directly or by permitting a jury to so do. Accordingly, as urged by petitioner, this Court should review the Second Circuit's rulings.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

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